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In the Supreme Court of the United States

OCTOBER TERM, 1951

THE UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

GREGORY HANKIN,
Counsel for Petitioner, the United States of America, on the relation of Oscar L. Chapman, Secretary of the Interior.

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No. —

THE UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR, PETITIONER

v.

FEDERAL POWER COMMISSION AND VIRGINIA ELECTRIC AND POWER COMPANY, RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable The Supreme Court of the United States:

This is a petition for the issuance of a writ of certiorari to review a judgment rendered by the United States Court of Appeals for the Fourth Circuit, denying petitions to set aside an order of the Federal Power Commission (Commission) which issued a license to the Virginia Electric and Power Company (VEPCO) to construct a hydroelectric project at Roanoke Rapids on the Roanoke River in North Carolina.[1]

[1] Since the case involves conflicting views of two Federal agencies, the Solicitor General has authorized the Secretary of the Interior and the Commission to proceed herein through their own counsel. (See p. 58, *infra*.)

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (V, 29)[2] is reported at 191 F. (2d) 796. The opinion and order of the Federal Power Commission have not yet been officially reported, but appear in the Appendix (I, 41 *et seq.*).[3]

JURISDICTION

The jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act. The judgment of the Court of Appeals, denying the petitions to set aside the Commission's order, was rendered on October 1, 1951. Petitions for rehearing were filed on October 30, 1951, and were denied on November 5, 1951. On January 29, 1952, this Court extended the time for filing petitions for writs of certiorari to and including April 1, 1952. This petition was filed within the time prescribed by law, as extended by order of this Court.

QUESTIONS PRESENTED

The questions presented herein are:

1. Whether the Secretary of the Interior (Secretary) and the Virginia REA Association and its member cooperatives (REA Association) are

[2] Volume V of the record includes the proceedings in the Court of Appeals.

[3] Volumes I, II, and III of the record constituted the petitioner's Appendix filed pursuant to the rules of the United States Court of Appeals for the Fourth Circuit.

parties "aggrieved" by the Commission's order, and whether they have standing in court to seek a review of such order under Section 313 (b) of the Federal Power Act (p. 74, *infra*).

2. Whether, under Section 10 of the Flood Control Act of 1944 (p. 68, *infra*) adopting a comprehensive plan consisting of 11 project units, the Government has entered upon the improvement of the entire Roanoke River Basin for flood control and other purposes, and whether the Roanoke Rapids site, which would be occupied by one of the units in the plan, has thus been withdrawn from the licensing jurisdiction of the Commission.

3. Whether, under Section 7 (b) of the Federal Power Act (p. 72, *infra*), the Commission, by its previous approval of a comprehensive plan for Federal development of the Roanoke River Basin, including a project unit at Roanoke Rapids, was prohibited from approving VEPCO's application.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in an Appendix hereto, pages 59 *et seq.*, *infra*.

STATEMENT

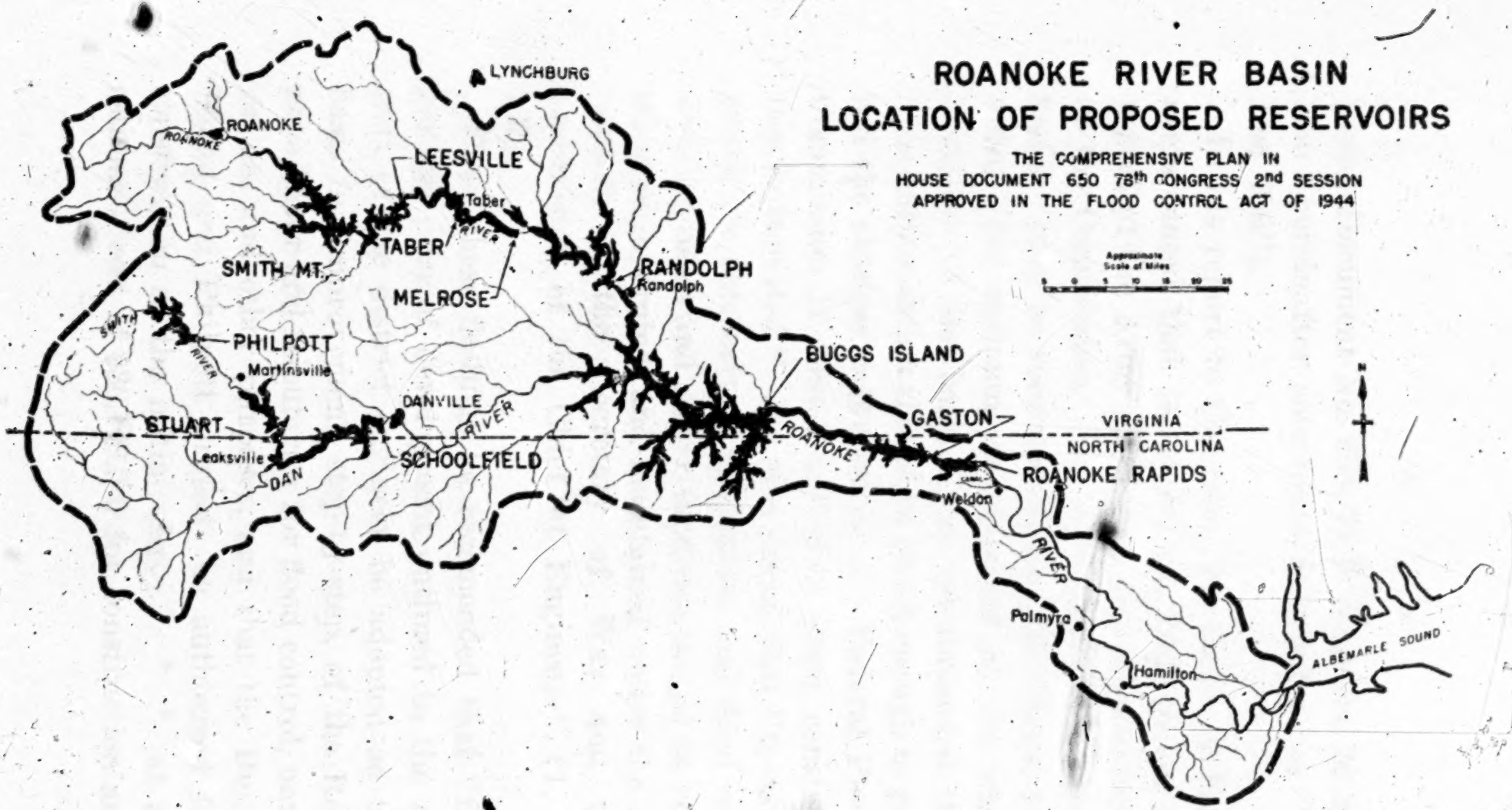
The following are the facts pertinent to a consideration of the questions presented herein:

1. In the Flood Control Acts of 1936 and 1938 (pp. 64, 66, *infra*) Congress authorized and directed the Secretary of War to make preliminary

examinations and surveys for flood control and allied purposes at various localities, including the Roanoke River and its tributaries. Upon such investigations made, the Army Engineers (first the District Engineer, then the Division Engineer, and then the Board of Engineers for Rivers and Harbors) submitted their reports in which they recommended a plan for the comprehensive development of the Roanoke River Basin. This development (see map opposite this page) was to consist of 11 dams and reservoirs to be constructed, at a then estimated Federal investment of $124,000,000, on a step-by-step basis, with Buggs Island and Philpott as the initial step. The plan contemplated that "Construction of other units of the comprehensive plan should be undertaken when warranted by the need for additional generating facilities in the area" (I, 149). Gaston and Roanoke Rapids were to constitute the next steps in the development (I, 148, 150–178 (b)).

2. In accordance with established practice, the reports of the Army Engineers were transmitted to the Federal Power Commission. In a letter dated May 3, 1944 (I, 142), the Commission, after making suggestions for various changes at the proposed dams, concurred in the conclusion of the Board of Engineers for Rivers and Harbors.

3. The Chief of Engineers then submitted his report to Congress, transmitting therewith the reports of the Army officers and the letter of the Commission. This report was published as



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House Document No. 650, 78th Congress, 2d Session (hereinafter sometimes referred to as "H. Doc. 650").

In his report to Congress, the Chief of Engineers stated that he based his findings on the report of the Army Engineers and the comments of the Commission. He found that the comprehensive plan as recommended by the Board provided "for optimum development of the water resources of the basin," but recommended that "the authorization should be broad enough to permit the changes suggested by the Federal Power Commission if found advisable when construction is initiated." He also found that "to safeguard the interests of navigation and flood control, the dams and power facilities should be constructed, operated, and maintained under the direction of the Secretary of War and the supervision of the Chief of Engineers" (I, p. 137).

Upon these findings he recomended that "the general plan of development outlined in the report of the district engineer be adopted as the basis for improvement, step-by-step, of the Roanoke River and tributaries for flood control, navigation, and other purposes, and that the Buggs Island and Philpott projects be authorized for construction as the initial step, * * * at an estimated cost of $36,140,000 for construction and

$164,000 annually for operation and maintenance" (I, 137–138).

4. In the sections of the Flood Control Acts of 1936 and 1938, in which the Secretary of War was authorized and directed to make investigations, Congress also provided that "the Government shall not be deemed to have entered upon any project for the improvement of any waterway mentioned in this Act until the project for the proposed work shall have been adopted by law" (pp. 64, 66, *infra*).

In Section 10 of the Flood Control Act of 1944 (p. 68, *infra*), Congress "adopted and authorized" a large number of "works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes". These works of improvement were adopted and authorized "in the interest of the national security and with a view toward providing an adequate reservoir of useful and worthy public works for the post-war construction program, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers, in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein."

The works of improvement referred to in the introductory paragraph of this section were listed in some 35 paragraphs. One of these paragraphs was entitled "Roanoke River Basin." Here, Congress approved the general plan for the com-

prehensive development of the Roanoke River Basin for flood control and other purposes as recommended by the Chief of Engineers in H. Doc. 650, and authorized the construction of Buggs Island and Philpott at an estimated cost of $36,140,000.

5. In Section 5 of the same Act (p. 67, *infra*), the Secretary of the Interior was constituted as the marketing authority for the power generated at reservoir projects under the control of the Department of the Army, except such power as in the opinion of the Secretary of the Army was needed for the operation of the projects themselves. The Secretary was required to transmit and dispose of the power in accordance with certain standards, namely: (a) in such manner as to encourage the most widespread use of the power at the lowest possible rates to consumers consistent with sound business principles; (b) at rates drawn with due regard to the recovery of the cost of generation and transmission; and (c) giving preference in the sale of such power to public bodies and cooperatives.

6. After the enactment of the Flood Control Act of 1944, Congress appropriated funds, and construction was begun on the Buggs Island and Philpott units in the comprehensive plan. The Buggs Island unit will have an ultimate installed capacity of 204,000 kw. and a controlled reservoir capacity of over 2,500,000 acre-feet. It will involve an investment of approximately $78,000,000,

and is estimated to go into operation in December 1952.

7. On October 6, 1948, VEPCO filed an application for a license to construct a hydroelectric project at Roanoke Rapids on the Roanoke River in North Carolina, at approximately the same site as that of the Roanoke Rapids unit in the Congressionally approved comprehensive plan.

8. In accordance with established practice, the Commission requested the Secretary to submit his comments on the application (R. 5098),[4] and the Secretary replied that he objected to the issuance of a license, both on jurisdictional and substantive grounds (R. 3636). The Commission then issued an order setting the application for hearing before an Examiner (R. 5117).

9. The Secretary, acting in his representative capacity as the head of the Department of the Interior, filed a petition for intervention in opposition to the issuance of such license (R. 5178). He asserted that he had an interest which would be substantially and adversely affected by the issuance of a license for this project, namely:

(a) That by Section 5 of the Flood Control Act of 1944 he was constituted as the marketing authority for the power generated at reservoir projects under the control of the Department of the Army, to be disposed of by him in accordance with the standards therein prescribed.

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[4] References to pages in the unprinted parts of the certified record.

(b) That Congress, by the Flood Control Act of 1944, approved a comprehensive plan for the development of the Roanoke River Basin, including project units at Buggs Island and Roanoke Rapids; that Buggs Island would involve a great investment on the part of the Government, resulting in net power benefits at Roanoke Rapids; and that these power benefits are, under the law, to be distributed by the Secretary among the people in the area in accordance with the standards and limitations prescribed in Section 5.

(c) That the issuance of a license for Roanoke Rapids and the withdrawal of this project from the Congressionally approved comprehensive plan would impose greater burdens on the Secretary in the disposition of power from Buggs Island and other units of the comprehensive plan, in that the power available for distribution would be diminished and the cost thereof would be increased.

The Virginia REA Association and its member cooperatives also intervened in the proceeding in opposition to VEPCO's application (R. 5214).

The petitions to intervene were granted by the Commission.[5]

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[5] On May 6, 1949, the Commission issued an order (R. 5255) granting permission to the REA Association to intervene in the proceeding, but denying the petition of the Secretary of the Interior. It held that formal intervention by him was not necessary since his assistance in the proceeding "was always welcomed." Later, upon petitions for reconsideration filed by the Secretary (R. 5341, 5370), the

10. After extensive hearings, the Examiner recommended that a license should be granted (III, 1045 *et seq.*, 1107 *et seq.*). Upon exceptions filed by the Secretary and the REA Association, oral arguments were heard by the Commission, and on January 26, 1951, the Commission issued its opinion and order, sustaining the recommendation of the Examiner (I, 41–78).

Pursuant to Section 313 (a) of the Federal Power Act (p. 73, *infra*), the Secretary and the REA Association filed their respective petitions for rehearing (R. 6056 *et seq.*, 6105 *et seq.*). These petitions were denied by the Commission on March 1, 1951 (R. 6110).

11. Within the time permitted by Section 313 (b) of the Federal Power Act (p. 74, *infra*), the Secretary and the REA Association filed their respective petitions in the United States Court of Appeals for the Fourth Circuit to review and set aside the Commission's order granting the license (I, 1 *et seq.*, 33 *et seq.*). The Court ordered that the two petitions be consolidated and set the consolidated cause for argument. On October 1, 1951, the court rendered its opinion and order denying the petitions to set aside the Commission's order (V, 29–47.)

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question of his right to intervene as a formal party in the proceeding was postponed to the final disposition of the case (R. 5400), and in the final order the Commission granted his petition for leave to intervene as of the date of the commencement of the hearing (I, 71).

The petitioners then filed their respective petitions for rehearing, asserting that the court had erroneously decided the questions presented and inviting the court's attention to the fact that it had based some of its conclusions upon incorrect statements of the petitioners' contentions (V, 47, 68). On November 5, 1951, the court below denied the petitions for rehearing (V, 64, 72).

REASONS FOR ALLOWANCE OF THE WRIT

The writ should be allowed for the following reasons:

I. In holding that the petitioners had no standing to seek a review of the Commission's order, the court below misinterpreted Section 5 of the Flood Control Act of 1944, and has rendered a decision on an important question of Federal law which has not been, but should be, settled by this Court (pp. 13–16, *infra*). In addition, the decision on the question whether the petitioners were parties "aggrieved" by the Commission's order is in conflict with applicable decisions of this Court and with decisions of other circuits on the same subject matter (pp. 17–25, *infra*).

II. In holding that, by Section 10 of the Flood Control Act of 1944, Congress did not reserve the development of the Roanoke River Basin for the United States, and that the Commission had jurisdiction to issue a license for Roanoke Rapids, the court below has rendered a decision on an important question of Federal

law which has not been, but should be, settled by this Court (p. 25, *infra*). In its interpretation of said Section 10, the court below rendered a decision in conflict with applicable decisions of this Court (pp. 25–48, *infra*).

III. In holding that the Commission was not barred by Section 7 (b) of the Federal Power Act from approving VEPCO's application, the court below rendered a decision on an important question of Federal law which has not been, but should be, settled by this Court (pp. 49–56, *infra*).

IV. The decision of the court below, if allowed to stand, will have grave consequences with respect to the Federal development of the water resources of the Nation (pp. 56–58, *infra*).

I

SECRETARY'S STANDING IN COURT

Although the Commission granted the Secretary's petition to intervene, it interpreted Section 5 of the Flood Control Act of 1944 as vesting only ministerial functions in the Secretary of the Interior.[6] The court below held that "until

[6] It held that "the only function assigned by Congress to the Secretary of the Interior in connection with the development of the Roanoke River is to dispose of surplus power generated at Buggs Island and Philpott flood control projects", that he had no authority even to make recommendations to Congress with respect to construction of power projects, and that he had no authority "to arrange for or provide new sources of power for new preference customer loads to be developed in the future" (I, 46, 62–3).

the Government has authorized a project and entered upon its construction he has no more duty or responsibility in this connection than has the Postmaster General", and that he "has, in fact, no responsibility whatever with respect to the power produced by any project until the Secretary of the Army has certified that in his opinion it is not needed in the operation of the project" (V, 31).

(A) *Secretary's function under section 5 of the Flood Control Act of 1944*

The court's decision that the Secretary had no standing in court, was based on its interpretation of Section 5 of the Flood Control Act of 1944, which, petitioner asserts, is erroneous, and presents an important question of Federal law which has not been, but should be, settled by this Court.

In holding that the Secretary has no responsibility with reference to power generated at Army projects until the Secretary of the Army has certified that the power is not needed for the operation of such projects, the court below assumed, contrary to fact and without support in the record, that the Secretary of the Army actually issues such certificates. This is not so. It would, indeed, be improvident to do so, since the

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amounts of power needed for the operation of the projects are insignificant.[7]

The amount of power available for disposition by the Secretary of the Interior becomes known when the Chief of Engineers issues what is known as the "Definite Project Report." This report is issued before a project is completed, before its construction is commenced, and before any appropriations are made for its construction.[8]

Section 5 of the Flood Control Act of 1944 must be read in conjunction with Section 3 of the River and Harbor Act of March 1, 1917 (39 Stat. 950, 33 U. S. C. 701, p. 59, *infra*). In this basic legislation, providing for examinations and surveys of projects relating to flood control and requiring the Corps of Engineers to make comprehensive studies of watersheds and to include in

[7] In the petition for rehearing (V, 47 *et seq.*), the court's attention was invited to the fact that the average amount of power used in the operation of Government projects is approximately 0.38 of 1% of the total power output.

[8] Prior to the issuance of the "Definite Project Report," Congress appropriates money for planning. These funds are later treated as a part of the cost of construction, but funds for the actual construction are appropriated after the "Definite Project Report" is submitted.

In the case of the Buggs Island unit of the comprehensive plan, the "Definite Project Report" is dated February 1, 1946, approximately 7 years before the time estimated for commencement of operation. All of the testimony in the record relating to the engineering problems in this case, including the availability of power from Buggs Island, was based on the "Definite Project Report", pertinent parts of which are in the record as Exhibit 10 (R. 3653 *et seq.*).

their reports, among other things, data in regard to "the possible economical development and utilization of water power", Congress expressly authorized the heads of the several departments to participate in these investigations "to the end that duplication of work may be avoided and the various services of the Government economically coordinated therein." In this statute Congress required the Chief of Engineers to submit all reports on "preliminary examinations hereafter authorized," including "the separate report of the representative of any other department," with his recommendations, to the Secretary of War, and required the latter to transmit the same to the House of Representatives.

In the light of this statute, the conclusion is inescapable that the Secretary's interest and responsibility in these developments begin before the projects are constructed and even before they are approved by Congress. Indeed, he must be in a position to participate in investigations and surveys authorized by Congress for flood control purposes, for it is at this stage that he can best make certain that the development ultimately constructed will render the application of the standards in Section 5 of the Flood Control Act of 1944, not only possible, but of greatest advantage to both the Government and the people.

In addition, Section 5 of the Flood Control Act of 1944 contemplates the construction or

acquisition of transmission lines and related facilities. It is a matter of public record that it takes several years to make the necessary surveys and studies, to obtain appropriations, and to construct a transmission line. Such line must be constructed by the time the first generating unit in a project is installed and ready to operate. This fact alone is incompatible with the proposition stated by the court below that the Secretary has no duty or responsibility with respect to a project until the power therefrom is made available for distribution.

It should also be borne in mind that generally the disposition of power in wholesale quantities is effected by means of long-term contracts. Purchasers of power (whether public bodies, cooperatives, or privately owned companies) must take into account, not only present power requirements, but also the requirements for the future. In order to make power available to consumers at the time when a project is completed, the Secretary must enter into contracts several years prior thereto.[9] In this view, also, the holding of the court, that the Secretary has no responsibility until the power is actually made available, is most unrealistic.

[9] E. g., although the Buggs Island unit in the comprehensive plan will not be ready for operation until the end of 1952, the eidence shows that in January 1949, VEPCO's representatives called on the Director of the Division of Power of the Department of the Interior to negotiate the purchase of Buggs Island power (I. 296).

(B). *Secretary's competitor interest*

In holding that until the Government has authorized a project and has entered upon its construction the Secretary has no more duty or responsibility with regard thereto than the Postmaster General, the court failed to distinguish between the substantial interest of the Secretary as a competitor of VEPCO and the unsubstantial interest of the Postmaster General as a consumer.

In the operation of the post offices in the area of Roanoke Rapids, North Carolina, the Postmaster General is a consumer of power. Had he sought to intervene in this proceeding, however, it is doubtful that he could have shown that his interest was substantial, or that an order granting a license to VEPCO would substantially and adversely affect that interest.

An entirely different interest was presented by the Secretary of the Interior in his petition for intervention. In the disposition of power in the Buggs Island-Roanoke Rapids area to public bodies, cooperatives and others, the Secretary is in competition with VEPCO. Hundreds of pages in the record in this case are devoted to testimony as to the amount of power which would be required by Federal establishments, state facilities, municipalities and cooperatives now served or intended to be served by VEPCO, and what should be the distribution of the power from Buggs Island in order to effect two results: *first*, to

comply with the standards laid down by Congress in Section 5 of the Flood Control Act of 1944; and *second,* to utilize to the maximum advantage the generating capacity of the Buggs Island project (I, 279–356, 388–566).

The competition between the Secretary and VEPCO is not mere theory. It is a very real and keen competition. Before the Southeastern Power Administration (SEPA) began negotiating with the National Advisory Committee on Aeronautics (NACA) to supply power for a wind tunnel at Langley Field, Virginia, VEPCO had offered to sell power to NACA, provided the latter would pay a "connection charge" in the sum of $4,000,000. When SEPA and NACA were about to conclude a Memorandum of Understanding for the sale of power, and the former sought and obtained appropriations to construct a transmission line between Buggs Island and Langley Field Virginia, VEPCO appeared before committees of Congress, first in opposition to the grant of appropriations, and later to urge revocation of the appropriations made. Then VEPCO offered a contract to NACA in which it eliminated its demand for any "connection charge" and offered to sell power at rates which would meet the rates of SEPA.[10]

[10] Compare Hearings on Supplemental Appropriations for 1951, House Committee, p. 115, with Hearings on Interior Appropriations for 1952, House Committee, p. 1458, Senate Committee, p. 994.

Here is another illustration of this keen competition: VEPCO has been furnishing power to the rural electric cooperatives in Virginia at one cent per kwh (II, p. 1010). The Old Dominion Electric Cooperative obtained a loan from the Rural Electrification Administration for the purpose of constructing a transmission line and a steam plant. It then entered into a Memorandum of Understanding with SEPA for the purchase of 35,000 kw of Buggs Island power (I, 566, also exhibit 91). The Cooperative applied to the Corporation Commission of Virginia for approval of its certificate to be issued for the loan. VEPCO appeared in opposition to this application. Thereafter it offered to furnish power to the Cooperative at an average rate of 7.5 mills per kwh, a reduction of 25%.[11]

VEPCO's application to the Commission for a license to construct a project at Roanoke Rapids is but a step in its effort to eliminate the competition of public power and thus strengthen its monopolistic stronghold in the area.[12] VEPCO's President, himself, testified that his Company had opposed the Government's construction of

[11] Hearings on H. R. 3790, 82d Congress, First Session, before Senate Committee on Interior Appropriations, p. 1001.

[12] In this respect VEPCO follows the general pattern in the industry. See *Power Districts: An Emerging Device for Low Cost Electricity*, 60 Yale L. J. 483, 486. See also Report of the President's Water Resources Policy Commission, Vol. I, pp. 228–229.

Buggs Island. Even after Congress had authorized the appropriation of funds, VEPCO employed agents to propagandize against the construction of this unit. It stopped in this effort only when, as the witness testified, it was "convinced that the people living in the valley really wanted the dam" (II, 1015–1017). After VEPCO saw that it could not defeat the construction of the Buggs Island unit, it joined in requests for appropriations for the construction of this unit, but only because it expected that all or at least half of the power from Buggs Island would be turned over to it, and that Buggs Island would be so operated that it would be dependable on VEPCO's system.[13]

VEPCO's Chairman of the Board testified that the construction of the Roanoke Rapids unit by the Government would in the long run deprive the Company of 91,000 kW (the capacity of its proposed project), no matter how many steam plants it might construct, as if the Company had a perpetual right of monopoly to all power production and distribution in the area (II, 1021–1023).

These facts show that the Secretary has a substantial competitor interest in the proceeding.

[13] VEPCO's Exhibit 29 (R. 3796, *et. seq.*) and its entire evidence as to the feasibility of its proposed project at Roanoke Rapids are based on the assumption that the power features of the Buggs Island unit would be operated for VEPCO's benefit (II, 729–731).

It cannot be likened to the interest which the Postmaster General might have.

The evidence also shows that this interest is substantially and adversely affected by the grant of the license. The granting of a license to VEPCO to construct a project at Roanoke Rapids means the withdrawal, from the Congressionally approved comprehensive plan, of 58,800 kw of capacity (the capacity of the unit in the comprehensive plan) and over 350,000,000 kwh of energy per year (I, 154–155). Since the full utilization of the capacity of Buggs Island would require its operation at a load factor of 23%, the power from Roanoke Rapids would serve to firm up the Buggs Island power and render it more salable and more valuable.

In terms of money, the withdrawal of the Roanoke Rapids unit from the comprehensive plan means a reduction of the feasibility ratio of the plan from 1.47 (I, 144–145) to 1.34 (I, 222), representing a reduction of $1,481,600 in gross power benefits, or $962,000 in net power benefits to the United States (I, 144). This, however, is an understatement of the actual effect, because these figures are based on estimates made in 1942. Based upon 1948 estimates (as of the time of the hearing), the withdrawal of the Roanoke Rapids unit from the comprehensive plan would mean a reduction of $2,669,000 in gross power benefits or $1,518,000 in net power benefits (I, 223).

Not only does the withdrawal of the Roanoke Rapids unit from the comprehensive plan mean a loss of power available to the Secretary for distribution under Section 5 of the Flood Control Act of 1944, but also an increase in the cost of generation per unit of power. The uncontradicted evidence shows that the cost of power from Buggs Island alone would be 5.10 mills per kwh. If Buggs Island and Roanoke Rapids were operated as a single enterprise, however, the cost of generation would be 4.16 mills per kwh (I, 279–290). This difference of approximately one mill per kwh in the cost of Buggs Island power is a very substantial amount (over $430,000 per year).

In view of the Secretary's competitor interest, which is substantially and adversely affected by the Commission's order, the decision that the Secretary is not an "aggrieved" party, is in conflict with applicable decisions of this Court, namely: *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, 476–7; *Scripps Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, 14–5. The decision below is also in conflict with the decision of the U. S. Court of Appeals for the District of Columbia Circuit on the same subject matter in *National Coal Association* v. *Federal Power Commission*, 191 F. (2d) 462.

(C) *The United States, through the Secretary, is the party in interest, and is "aggrieved" by the Commission's order*

In the disposition of power from Army projects, the Secretary is the agent of the United States. In this respect he stands in the position of the United States, with an interest of *parens patriae*.[14] Since he appeared in his official capacity, the United States was the real party in interest,[15] both before the Commission and in the court below.

The Secretary intervened in the proceeding before the Commission as the tribunal of primary jurisdiction, not in opposition to the Commission, but in opposition to VEPCO. The Commission's function, in the proceeding before it, was that of an impartial tribunal to determine the questions of law and fact presented in the controversy. In the court below, VEPCO (not the Commission) was the real party respondent.[16]

Insofar as the court below failed to recognize that the real party petitioner was the United States, and that it had an interest in the case as

[14] *In re Debs*, 158 U. S. 564, 584; *United States* v. *Minnesota*, 270 U. S. 181, 194.

[15] *Benton* v. *Woolsey*, 12 Pet. (37 U. S.) 27, 30; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387; *Mine Safety Company* v. *Forrestal*, 326 U. S. 371, 374–5.

[16] The Commission was joined as a party respondent in the court below, not because it was a necessary party, but because that has become the established practice in proceedings to review the Commission's orders.

parens patriae, the decision below is in conflict with that of the Fifth Circuit in *Cia Mexicana de Gas, et al. v. Federal Power Commission,* 167 F. (2d) 804, 805–6, where the State of Texas was held to be a party "aggrieved" by an order of the Commission. We also submit that, insofar as the court arrived at its conclusion because of any distinction between the Secretary and a private litigant, its decision is probably in conflict with the decision of this Court in *United States* v. *Interstate Commerce Commission,* 337 U. S. 426.

The court below sought to distinguish this case by holding that the interest of the United States did not confer upon the Secretary any authority to go into court for its protection, since the safeguarding of that interest has ben confined to the Federal Power Commission[17] (V, 31). The court's reasoning, however, begs the question. The very question presented for review was whether in this case the Commission had authority to grant a license. In determining whether a party is "aggrieved" or has standing in court, it must be assumed that his substantive allegations are correct.[18] In this respect the decision

[17] The Commission is empowered by Section 4 (e) of the Federal Power Act to grant licenses upon the conditions set forth in the Act, including the limitation that, if in its judgment, the development of water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development (Sec. 7 (b)).

[18] *Chicago Junction Case,* 264 U. S. 258, 262–3.

is in direct conflict with that of the Second Circuit in *Associated Industries* v. *Ickes*, 134 F. (2d) 694, 699, where that court held that, in determining whether a petitioner has standing in court, it must be assumed that the order in question is invalid for the precise reasons assigned by him.

II

RESERVATION OF ROANOKE RAPIDS FOR FEDERAL DEVELOPMENT

In holding that, by Section 10 of the Flood Control Act of 1944 (p. 68, *infra*), Congress has not adopted the development of the entire Roanoke River Basin, and has not withdrawn Roanoke Rapids from the licensing jurisdiction of the Commission (V, 32–40), the court below rendered a decision on an important question of Federal law which has not been, but should be, settled by this Court. The question of law is especially important, considering that Section 10 is a part of a system of legislation which has assumed a definite pattern, and therefore the question of law relates to the meaning and effect of similar provisions in all flood control legislation.

In arriving at its conclusion, the court (A) resorted to judicial legislation, (B) violated the rule that where a statute is clear there is no need for interpretation, and (C) violated established rules of statutory construction, all in conflict with applicable decisions of this Court.

(A) *Interpretation versus judicial legislation*

When a statute prescribes one test for determining whether the Government has entered upon a work of improvement, it is not permissible for a court to substitute another test. To do so would constitute legislation, not adjudication.

In flood-control legislation and its execution, the following steps usually take place in chronological order:

(1) Congress authorizes and directs the Secretary of the Army to make surveys and investigations at specified streams or localities, but provides that the Government shall not be deemed to have entered upon any improvement until it is "adopted by law."

(2) The Army Engineers make the surveys authorized and submit their survey reports, which, if favorable for Federal development, are published as Congressional documents.

(3) Congress by statute provides that certain improvements recommended in the Congressional documents for Federal development are "adopted and authorized", and that the plans of development are "approved."

(4) Either in the same statute or in subsequent statutes, Congress authorizes appropriations for construction, either for the entire improvement recommended or for parts thereof.

(5) Congress appropriates "planning money."

(6) The Army Engineers submit a "Definite Project Report" for each dam and reservoir.

(7) Congress appropriates funds for the construction of such dam or reservoir.

(8) The Army Engineers then proceed with the construction.

(9) If it appears that the sums authorized to be appropriated will not be sufficient, additional sums are authorized to be appropriated, and additional appropriations are made.[19]

At what stage in this process does the Government enter upon the improvement? According to the statutory provisions, the Government is deemed to have entered upon an improvement when it is "adopted by law", which is step (3) stated above. According to the court below, the Government does not enter upon an improvement until appropriations are authorized for construction, which is step (4) above, or until construction is begun, which is step (8) above.

The court below justified its use of a test different from that prescribed by the statute, stating:

> Since the passage of the act, *Congress has twice taken action* which is *inconsistent* with the idea that projects not specifically authorized were *adopted* for construction because embraced in the general plans ap-

[19] At times additional appropriations are made without going through the formality of "authorizing" additional appropriations.

> proved—once in considering but *refusing to authorize* the construction of the Smith Mountain project on the Roanoke River embraced in the comprehensive plan here under consideration, and again in *authorizing* the construction of the Hartwell project on the Savannah River. [Italics supplied.] (V, 36.)

There was no "action taken by Congress" refusing to authorize Smith Mountain.[20] At most there was a non-authorization of this project unit. Either or both (i. e., non-authorization and authorization of additional projects in a comprehensive plan) may be consistent with the idea that projects within the plan are adopted for construction, but they can-

[20] In 1949 the Committee on Public Works of the House of Representatives was considering H. R. 5472, 81st Congress, First Session. The Chief of Engineers submitted no report recommending modification of the comprehensive plan for the development of the Roanoke River Basin. Col. Gee of the Corps of Engineers appeared before this Committee and urged a deviation from the plan by authorizing Smith Mountain, instead of Gaston or Roanoke Rapids, as the next step in the development. The Committee did not adopt his suggestion. It did not include the suggestion in the bill. It did not even report the suggestion to the House. Later, the Senate Committee on Public Works held hearings on this bill. Col. Gee appeared before this Committee, also, but made no mention of the Smith Mountain project. There was no "action by Congress", nor any action by the House of Representatives or by the Senate. At most, it can be said that there was refusal to act by the House Committee on Public Works. Yet, according to the court below, "Congress has taken action" by "considering but refusing to authorize the construction of the Smith Mountain project" (V, 36) (see also note 28, *infra*).

not both be inconsistent therewith. This is elementary logic.[21] The court's reasoning is valid only where there are no projects in the Congressionally approved plan. It is not necessary or proper to resort to such reasoning in order to avoid the consequences of the test laid down by Congress; i. e., that the Government shall be deemed to enter upon a development when it is "adopted by law".

It should be noted that the court used the phrase "adopted for construction" for the word "adopted" used in the statute. It did not so treat the word "approved." True, the term "adopted" as used in this statute does mean "adopted for construction", and it is equally true that the term "approved" means "approved for construction." This is clear not only from the context of the statute, but also from the recommendation of the Army Engineers (see p. 4, *supra*). Obviously, when a plan recommends construction, and it is adopted or approved, it is adopted or approved for construction. There is nothing inconsistent between approval of a plan for construction and later authorization of the construction itself.

[21] To say that A is inconsistent with B, and not-A is inconsistent with B, actually means that B is nonexistent.

(B) *Where a statute is clear and unambiguous there is no need for interpretation*

In undertaking to "interpret" Section 10 of the Flood Control Act of 1944, the court below rendered a decision probably in conflict with the decisions of this Court holding that, where a statute is clear and unambiguous, there is no need for interpretation. *Hamilton* v. *Rathbone,* 175 U. S. 414, 421; *Van Camp and Sons* v. *American Can Company,* 278 U. S. 245, 253; *Caminetti* v. *United States,* 242 U. S. 470, 490; *United States* v. *Lexington Mill & E. Company,* 232 U. S. 399, 409; *Wilkinson* v. *Leland,* 2 Pet. (27 U. S.) 627, 662.

That the statute is clear and unambiguous may be demonstrated by the following propositions:

(1) In the provisions of the 1936 and 1938 Flood Control Acts, authorizing and directing the Secretary of War to make the surveys and investigations, Congress provided that:

> The Government shall not be deemed to have entered upon any project for the improvement of any waterway mentioned in this Act *until* the project for the proposed work shall have been *adopted by law.* [Italics supplied.]

(2) A survey report on the Roanoke River Basin was submitted and printed as H. Doc. 650, recommending a Federal river basin development.

(3) In Section 10 of the Flood Control Act of 1944 Congress provided:

> *That the following works of improvement* * * * are hereby *adopted and authorized* * * * *to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers* in accordance with the plans in the respective reports hereinafter designated and *subject to the conditions set forth therein.* [Italics supplied.]

(4) Among "the following works of improvement" listed in that section is "the general plan for the comprehensive development of the Roanoke River Basin for flood control and other purposes recommended by the Chief of Engineers in House Document Numbered 650, Seventy-eighth Congress, second session."

(5) Therefore, the Government has entered upon the improvement of the Roanoke River Basin in accordance with the plan set forth in House Document 650.

The same result obtains if one limits consideration, as the court below did, to the paragraph in Section 10 entitled "Roanoke River Basin."

(1) In House Document 650, the Chief of Engineers, after stating his findings, recommended as follows: "I accordingly recommend that the general plan of development * * * *be adopted* * * *." [Italics supplied.]

(2) Congress acted favorably upon this rec-

ommendation without qualification. *It adopted the general plan recommended by the Chief of Engineers.*

(3) The plan was adopted *by Act of Congress;* it was "adopted by law."

(4) It follows, therefore, that the Government has thereby entered upon the improvement of the Roanoke River Basin in accordance with the plan in H. Doc. 650.

The result does not depend on any interpretation of one or another word or phrase in the statute under consideration.

(C) *The court below erred in its interpretation of section 10*

Assuming that section 10 of the Flood Control Act of 1944 is not clear and unambiguous, the court below erred in failing to follow the applicable decisions of this court, embodying rules of statutory construction.[22] We submit that the

[22] It is conceded that statutory construction is not a mechanical process of measuring an enactment by a rigid rule. On the other hand, statutory construction does not involve an arbitrary choice of one or another rule of interpretation, nor does it reflect the arbitrary will of the adjudicator. Rules of interpretation have been evolved to play an important role in ascertainment of the legislative intent and lend uniformity and stability to the body of statutory law. Since these rules deal with a variety of categories (e. g., with the primary and secondary sources of interpretation, with the relation of the statute under consideration to other statutes or to the general body of the law, or with the ends to be obtained in the terms of equity or public welfare), they often

court below has failed to balance and apply the following rules: (1) every part of a statute must be given effect, (2) the language of the statute must be given its common meaning, (3) public rights must be preferred to private privilege, (4) unjust and unreasonable results should be avoided, and (5) due consideration should be given to the proper sources of or aids to interpretation.

(1) Every part of a statute must be given effect

The court below considered the introductory paragraph of Section 10 only for the purpose of discarding it (V, 34), leaving its provisions without any effect. In this respect the decision is in conflict with such applicable decisions of this Court as *Platt* v. *Union Pacific Railroad Company*, 99 U. S. 48, 58; *Bernier* v. *Bernier*, 147 U. S. 242, 246; *Wilkinson* v. *Leland*, 2 Pet. (27 U. S.) 627; 662; *Washington Market Company* v. *Hoffman*, 101 U. S. 112, 115.

The court justified this approach by misapplying another rule of statutory construction, namely that "the general language of a statute will not be held to apply to a matter specifically dealt with", citing *MacEvoy* v. *United States*, 322 U. S. 102, 107 (V, 34). It based its decision on the paragraph entitled "Roanoke River Basin", as if it were a specific provision which constituted an

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overlap and at times are in conflict with each other. They must therefore be balanced in order to arrive at the meaning and effect of the enactment.

exception to the general provision found in the introductory paragraph of Section 10. The provision, however, is not an exception to the introductory paragraph of Section 10, but one of the "works of improvement" enumerated in the entire Section. The effect of the court's decision is to render ineffective and meaningless the key word "adopted" in the introductory paragraph of Section 10.

If a distinction is to be made as between the project units which were "authorized" for construction and the other units in the plan "approved" for construction, such distinction has a basis in the introductory paragraph of Section 10; namely, that there was an immediate authorization for the construction of Buggs Island and Philpott, whereas the construction of the remaining project units was to be "initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements."

(2) Rule as to common usage

It is a settled rule of statutory construction that the usual, ordinary and nontechnical meaning of the words used in a statute must be adopted, where such meaning is consonant with the purpose of the statute. *United States* v. *First National Bank*, 234 U. S. 245, 258; *Old Colony Railway Company* v. *Commissioner of Internal Revenue*, 284 U. S. 552, 560; *Reinecke* v. *Smith*, 289 U. S. 172, 174–5.

Even if the court below were right in giving effect only to the paragraph entitled "Roanoke River Basin", it erred in failing to ascribe the proper meaning to the word "approved", which in common usage means "adopted". The word "adopted", used in both the provisions authorizing examinations and surveys and in Section 10 of the Flood Control Act of 1944, means "taken or received as one's own, selected and taken or *approved*" (Webster's New International Dictionary). The words "approve" and "authorize" have a common connotation.[23] In flood control legislation, in debates in Congress and in the nomenclature of the executive departments dealing with these statutes,[24] the words "approved" and "authorized" are used interchangeably, and "approval" implies "authorization".

In addition, in congressional terminology the word "authorized" has attained a technical meaning, when used in connection with ap-

[23] See also *Creek Nation* v. *United States*, 318 U. S. 629, 639; *Apfel* v. *Mellon*, 33 F. (2d) 805, 806; *Tibbens* v. *Clayton*, 288 F. 393, 396; *Hubbard* v. *Fort*, 188 F. 987, 994, 997; *Stewart* v. *Yellowtail*, 35 F. Supp. 798, 799.

[24] Even Col. Gee, on whose testimony before a committee of Congress the court below relied for a distinction between "approval" and "authorization", could not help admitting that his recommendation for a change in the Roanoke River Basin plan was "a deviation from the original recommendation of the Chief of Engineers *when this basin plan was authorized*." [Italics supplied.] Hearings on H. R. 5472 (II) before the Committee on Public Works, H. R. 81st Congress, Second Session, p. 137.

propriations. "Authorization of appropriations" means that the Committee on Appropriations may recommend appropriations for approval by Congress. Generally, when the word "authorization" is used in this sense, it is accompanied by a figure representing a sum of money. Bearing in mind this technical use of the term "authorized", it is clear that the comprehensive plan was "approved" or was "authorized" in the sense that it was given legal sanction, and appropriations were "authorized" (in the technical sense) for the construction of Buggs Island and Philpoft as the *initial step* in the comprehensive plan.

(3) Public rights must be preferred to private privileges

Even if there were a reasonable choice of meaning which could be attributed to the terms "approved" and "authorized", such choice must be resolved in favor of the public, rather than in favor of a private corporation seeking the grant of a public privilege. *Mills et al.* v. *St. Claire County et al.*, 8 How. (49 U. S.) 569, 581; *Commercial Standard Insurance Company* v. *Robertson*, 159 F. 2 (d) 405, 410; *Virginian Ry. Co.* v. *Federation*, 300 U. S. 515, 552.

The primary right in the development and utilization of water resources is in the United States itself. A license granted under the Federal Power Act is a grant of a privilege. *Northern States Power Company* v. *Federal Power*

Commission, 118 F. 2 (d) 141; see also *Alabama Power Company* v. *Federal Power Commission*, 128 F. 2 (d) 280, 288; *United States* v. *Appalachian Electric Power Company*, 311 U. S. 377, 427. Therefore, in this respect, also, the decision below is in conflict with applicable decisions of this Court.

(4) Unjust and unreasonable results must be avoided

The rule giving preference to public as against private rights is especially applicable where the grant of a license to construct a hydroelectric project involves not only the privilege to develop a project site on a navigable stream, but also the surrender of huge power assets which are the fruits of the Government's investment in an upstream development.

Th development of Roanoke Rapids derives its value mainly from the Goverbment's hugh reservoir at Buggs Island. It may fairly be stated, as an engineering fact, that Gaston and Roanoke Rapids are powerhouses of the Buggs Island Reservoir. It is because of the Government's investment in Buggs Island that the net power benefits of *Roanoke Rapids in the comprehensive plan* would be in excess of $75,000,000 over the 50-year period of the license granted to VEPCO. This fact was recognized by the President's Water Resources Policy Commission in its re-

port, when it commented on VEPCO's application for license, as follows (Vol. I, p. 238):

> Issuance of such licenses to private power interests would have far-reaching effects upon Federal water resources programs, and more especially upon power policy, an important factor in such programs. Power values created by Federal investment in multiple-purpose programs would be utilized for private profit, instead of bringing about reductions in electric rates and expanded use of electricity.

It is unjust and unreasonable to surrender the fruits of the Government's investment in Buggs Island to a private power company, rather than distribute the power benefits among the people in the area.

The court's interpretation of Section 10 thus leads to an unjust and unreasonable result, contrary to the decisions of this Court requiring that statutes should be so interpreted as to avoid results which are unjust, unreasonable or absurd. *United States v. Kirby,* 7 Wall. (74 U. S.) 482, 486–487; *Lau Ow Bew* v. *United States,* 144 U. S. 47, 59.

The court below seems to justify the result it reached by holding that "provision had been made, in Section 10 (f) of the Federal Power Act, for the Power Commission to assess the value of such benefits against the licensees of the power projects" (V, 40). But this proposition is erroneous both in theory and in fact.

It is erroneous in theory, because the headwater benefit payments provided for in Section 10 (f) do not contemplate reimbursing the upstream developer for benefits which he would derive by constructing projects downstream, but only for an equitable part of operation, maintenance and depreciation in the upstream development. This cannot be more than the benefits actually conferred on the downstream project. The benefits conferred on the downstream project may be small, yet the benefits lost by the upstream developer may be very great.

The proposition is also erroneous in fact, because the evidence shows that the net power benefits which the Government would derive from constructing the Roanoke Rapids unit would be in excess of $1,500,000 per year (I, 223), whereas the headwater benefits (assuming that they have been correctly determined by the Commission) would not be more than $250,000 per year (I, 56). The net result would nevertheless mean that the United States would be deprived of over $62,500,000 of net power benefits for the period of the license.

(5) Sources of statutory construction

The primary source of statutory construction is the language of the statute itself. If this source is not sufficient to yield the true meaning and effect, then resort may be had to other sources like. (a) the system of legislation of which the

statute forms a part, (b) other statutes dealing with the same subject matter, (c) administrative interpretation, and (d) legislative history.

(a) *The system of flood control legislation.*—The court below erred in failing to interpret Section 10 in the light of the entire Flood Control Act of 1944, and of the system of legislation of which this act is a part. *United States* v. *Jefferson Electric Manufacturing Company*, 291 U. S. 386, 396; *Hynes* v. *Grimes Packing Company*, 337 U. S. 86, 116.

The history of flood control legislation, beginning with the Act of March 1, 1917 (p. 59, *infra*), shows that the watershed or river basin has been, in the mind of Congress, the *basic unit* for multiple-purpose development of water resources. Between the years of 1917 and 1936, the Secretary of War was authorized and directed to make various investigations and surveys for flood control and allied purposes without necessarily looking toward Federal development. However, whenever works of improvement were "adopted and authorized," they were to be carried out by the Army Engineers "under the direction of the Secretary of War and supervision of the Chief of Engineers", as Federal developments.

In section 1 of the Flood Control Act of 1936 (p. 62, *infra*), Congress adopted a policy of Federal improvement for flood control wherever the benefits exceeded the costs. In section 2 of

the same Act (p. 63, *infra*), Congress provided that thereafter Federal investigations and *improvements* for flood control and allied purposes should be under the jurisdiction of the Secretary of War and supervision of the Chief of Engineers "except as otherwise provided by Act of Congress." It further provided that in his reports upon examinations and surveys, the Secretary of War should be guided as to flood control measures by the principles set forth in Section 1, in the determination of the interests involved. In other words, where the benefits exceeded the cost, the project should be recommended to be undertaken by the Federal Government. These provisions were reenacted in the later flood control acts and were codified as Section 701 (b), Title 33, U. S. C. (p. 67, *infra*).

Beginning with the Flood Control Act of 1936, the flood-control acts assumed a definite pattern. In each of these acts, Congress in one section authorized examinations and surveys to be made by the Secretary of War at various localities, and in another section it "adopted and authorized" various projects or river basin developments, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the survey reports submitted and printed as Congressional documents. In all instances, except where it was otherwise expressly provided, the investigations

were made and the improvements were or are being carried out by the Army engineers under the direction of the Secretary of War and the supervision of the Chief of Engineers.

The investigations and improvements of the Roanoke River Basin are within this pattern of legislation. Therefore, even if Congress had not expressly stated in the 1944 Act that it "adopted and authorized" these projects as "public works" to be carried out "under the direction of the Secretary of War and supervision of the Chief of Engineers," consistent with "budgetary requirements," the necessary implication would have to be that these works were to be carried out by the Army Engineers, with Federal funds, and not by any private person acting under a license of the Federal Power Commission or otherwise.

The contrary conclusion reached by the court below leads to an anomaly; namely, that an administrative agency may defeat an act of Congress.

Here, Congress authorized and directed the Secretary of War to make his investigations and to submit his reports in conformity with the principles set forth in the 1936 Act. A survey report was submitted on a river basin plan which was represented to Congress as economically justifiable, i. e., as having a feasibility ratio of 1.47 and, therefore, as conforming with the prin-

ciple that it should be undertaken by the Federal Government.[25]

In view of the economic feasibility of the entire plan, the Chief of Engineers recommended: (1) that the entire plan be adopted; (2) that the dams and power facilities be constructed, operated and maintained under the direction of the Secretary of War and supervision of the Chief of Engineers, and (3) that Buggs Island and Philpott should be authorized to be constructed as the "initial step" in the development. Congress acted favorably upon this recommendation.

Now a license is granted for Roanoke Rapids which, according to 1942 estimates, reduces the feasibility ratio of the plan to 1.34 (I, 222). After the decision of the court below, VEPCO applied for a license to construct Gaston (16 F. R. 10613). If a license is granted for this project also, the feasibility of the Federal development will be reduced to a ratio of 1.19 (again, according to 1942 estimates (I, 224)). If a license is granted for still another project, or

[25] It should be noted that some of the project units of this plan, taken by themselves, are not economically feasible at all, and some are of questionable economic feasibility. That is to say, some of the project units have feasibility ratios of less than 1, and others have feasibility ratios so close to 1, that any substantial variation in prices may render them economically infeasible. The entire plan was economically feasible, largely because with Buggs Island constructed, Gaston and Roanoke Rapids would have feasibility ratios of 2.32 and 2.60, respectively (I, 144–5).

if with the present price levels the feasibility ratio of the seven remaining project units is reduced to less than 1, then, according to Congressional policy, the Federal Government should not carry out the remainder of the comprehensive plan approved by act of Congress. Thus, the act of Congress would be defeated. Surely, it could not have been intended that acts of Congress adopting plans for river basin development might be defeated by administrative action.

(b) *Statutes must be reconciled, or the later statute governs.*—The court below adopted the respondents' argument that, if this project site is held to have been reserved for development by the United States and withdrawn from the licensing jurisdiction of the Commission, then there may be many other sites which are so withdrawn from the licensing authority of the Commission, and that Congress could not have intended this result. Here, again, had the court below interpreted Section 10 of the Flood Control Act of 1944 in the light of the history of the Federal Power Act and the facts appertaining to the licensing of hydroelectric projects under that act (all of which was brought to the court's attention), it would have had to arrive at the conclusion that the Flood Control Act of 1944 was reconcilable with the provisions and the purposes of the Federal Power Act, or that the later statute governed. *United States* v. *California*, 297 U. S. 175, 187–8.

The court below held (V, 35) that, had Congress intended to withdraw the project site from the licensing jurisdiction of the Commission, it would have done so in language similar to that used in other statutes, for example, in the Boulder Canyon Project Act (45 Stat. 1057, 1062), or in the act banning licenses for projects in the Potomac River Basin (43 Stat. 1012). Here, also, the statutes are reconcilable.

In enacting legislation, Congress is not limited to one or another mode of expression. Where statutes are different, the language is bound to be different. In the two statutes mentioned, the purpose was to withdraw the entire Colorado and Potomac Rivers from the licensing jurisdiction of the Commission. The language of the statutes expressed such meaning and effect. In the statute under consideration, the purpose was for the Federal Government to develop the Roanoke River Basin at specified sites; the effect of the statute is to withdraw these project sites from the licensing authority of the Commission. Where the effect is obvious, it is not necessary to spell it out.

(c) *Administrative interpretation.*—Instead of interpreting Section 10 in accordance with its language and in the light of the entire statute and of the body of flood control and power legislation, the court below relied (V, 37–8) on statements taken out of context made by Col. Gee, an Army engineer, in 1949, as to what he thought the

1944 Act meant, when he testified before a committee of Congress *in support of a change* in the comprehensive plan for the development of the Roanoke River Basin, stating that "approval" did not mean "authorization." (See pp. 28, 35, *supra.*)

It has been held that long continued or settled, contemporaneous, and practical interpretation of a statute by executive officers charged with its administration and enforcement constitutes a valuable aid in determining the meaning of a doubtful statute. *Edward's Lessee* v. *Darby,* 12 Wheat (25 U. S.) 206, 210; *Smiley* v. *Holm,* 285 U. S. 355, 369; *McLaren* v. *Fleischer,* 256 U. S. 477, 481; *United States* v. *Chicago, N. Shore & M. Railroad Company,* 288 U. S. 1, 13; *United States* v. *Shreveport Grain & Elevator Company,* 287 U. S. 77, 84. To give efficacy to this rule, however, it must appear that the administrative interpretation has continued for a long period, has received wide acceptation, and was made at or near the time of the enactment of the statute. None of these attributes is applicable to Col. Gee's statements, made, as the Examiner stated, "in the same breath, as it were, with this application" (III, 1077).

Quite a different statement was made by the Army Engineers when the paragraph entitled "Roanoke River Basin" in Section 10 of the Flood Control Act of 1944 was before the Senate Committee on Commerce. Then the representa-

tive of the Army Engineers referred to the entire plan as "Federal works", and the recommendation with regard to Buggs Island and Philpott was that their construction should be authorized "at this time" (Hearings on H. R. 4485, 78th Congress, Second Session, p. 24). It was upon this statement to the Senate Committee that the "Roanoke River Basin" paragraph was inserted in the bill, and was thus passed by Congress.

Even where a proposed amendment comes before the Congress as a body, and is defeated, the legislative intent may not be construed as embracing the effect of the language rejected. *Fox v. Standard Oil Company*, 294 U. S. 87, 96. Here Col. Gee's proposed amendment to the Congressionally approved comprehensive plan was not even reported out of the Committee. (See p. 28, *supra*.) In these circumstances, the statements made by Col. Gee cannot be regarded as an authoritative source of interpretation.

(d) *Debates in Congress.*—Upon the proposition that Roanoke Rapids is a "straight power" project, and a statement made by the Chairman of the House Committee on Flood Control, to the effect that "all of the dams authorized were primarily for flood control and none was primarily for the generation and distribution of power", the court below concluded: "This would seem to negative any suggestion that it was intended to authorize straight power projects, like

Roanoke Rapids, merely because they were embraced in the general plans that were given approval" (V, 35).

This conclusion is erroneous for two reasons:

First. It is true that Roanoke Rapids, taken by itself, is a power project. As one of the units in the comprehensive plan of development adopted by Congress, however, Roanoke Rapids, like Gaston and like the powerhouse at Buggs Island, is a power facility in the integrated plan adopted for "flood control and other purposes", as Congress expressly provided. It is the river-basin plan that constitutes the basic unit of development.

Second. While statements made by the chairman of a committee reporting a bill on the floor of either House of Congress have been held to be a proper source of interpretation,[26] such statements may be used to clarify the language used in the statute, not to defeat the express statutory provision. Of course, the dams were authorized "primarily for flood control and not primarily for the generation and distribution of power." This is quite consistent with the provision in the statute that "the general plan for the comprehensive development of the Roanoke River Basin for flood control and other purposes * * * is approved," and that the entire river basin development has been "adopted and authorized."

[26] *United States* v. *St. Paul M. & M. Ry. Co.*, 247 U. S. 310, 318.

III

OPERATION OF SECTION 7 (B) OF THE FEDERAL POWER ACT

Assuming, *arguendo*, that Section 10 of the Flood Control Act of 1944 did not have the effect of withdrawing Roanoke Rapids from the licensing jurisdiction of the Commission, petitioners submit that the Commission was barred from approving VEPCO's application by Section 7 (b) of the Federal Power Act, which provides as follows:

> Whenever, in the judgment of the Commsion, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

As the statute reads, two conditions precedent must exist for the prohibition against approval of an application to take effect: (1) the Commission must express a judgment that the development of water resources for public purposes should be undertaken by the United States, and (2) the project for which an application is filed

must be one which would affect such development. Both conditions are satisfied in this case.

(1) The Commission's letter of May 3, 1944 (I, 142) undoubtedly expressed a judgment that the development of the water resources of the Roanoke River Basin should be undertaken by the United States. The Commission could not have intended otherwise, when it stated that it concurred in the conclusion reached by the Board of Engineers, for the conclusion of the Board was that the dams and power facilities in the entire comprehensive plan should be constructed, operated and maintained under the direction of the Secretary of War and supervision of the Chief of Engineers at a Federal investment of $124,000,000 (I, 149).

The court below recognized that, in this letter, the Commission gave "its approval with certain modifications, to the general plan for the development of the Roanoke River Basin recommended by the engineers" (V, 40). The court, however, minimized the importance of the Commission's approval, because it was made in the course of a practice of cooperating with the Army Engineers.[27]

[27] This practice had its origin in the fact that, since 1938, the provisions in the flood control acts adopting works of improvement to be prosecuted by the Corps of Engineers required that "penstocks or other similar facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam herein authorized when approved by the Secretary of War upon recommendation of the

We submit that these circumstances render the Commission's judgment more, rather than less, significant. At any rate, it does not obviate the fact that the Commission thus expressed its judgment that the development of the water resources in question should be undertaken by the United States.

Section 7 (b) starts with the word "Whenever," which means "at whatever time" (Webster's New International Dictionary). It means that, if at any time, the Commission arrives at such a judgment, the prohibition of the section takes effect against the approval of any application for any project affecting such development, whether such judgment is arrived at in connection with an application for a license under Section 4 (e) of the Act (p. 70, *infra*), or in connection with any study or consideration of water resources under any other statutory authority, as, for example, when concurring in the conclusions reached by the Army Engineers under applicable provisions of the flood control acts (pp. 65, 69, *infra*).

(2) There is also no doubt that VEPCO's proposed project would affect the Federal development of the water resources of the Roanoke River Basin. The withdrawal of the Roanoke Rapids project unit from the comprehensive plan of necessity affects the plan, because it means with-

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Chief of Engineers and the Federal Power Commission". Section 4 (c) of the Federal Power Act (p. 69, *infra*) also requires cooperation between the Commission and the various executive departments of the National Government.

drawal of net power benefits in the amount of $1,500,000 per year and an increase in the cost of generation per unit of energy. This has already been mentioned. The withdrawal of the Roanoke Rapids project from the comprehensive plan would have a grave economic effect upon the Secretary's disposition of power from Buggs Island in accordance with the standards prescribed in Section 5 of the Flood Control Act of 1944.

In view of these facts, the court below should have come to the conclusion that the Commission was barred by Section 7 (b) from approving VEPCO's application.

The court held that the Commission was not barred from granting the license in question because its approval of the comprehensive plan in its letter of May 3, 1944, did not constitute a section "7 (b) recommendation to Congress" (V, 41). The court interpreted the statute as if the requirement to make examinations and surveys, and to submit findings and recommendations, were also a condition precedent to the prohibition. This is not how the statute reads. The requirement in Section 7 (b) that the Commission shall make examinations and surveys, and shall submit findings and recommendations to Congress, constitutes a requirement subsequent to the prohibition against approval of a license.

Assuming that the prohibition does not take

effect until the Commission submits its recommendations to Congress, the court nevertheless erred in holding that the prohibition of Section 7 (b) did not take effect. The letter of May 3, 1944, was sent by the Commission to the Chief of Engineers, who transmitted it to Congress and incorporated the Commission's comments in his own recommendations. When Congress approved the plan recommended by the Chief of Engineers, it did so in the light of both the reports of the Army Engineers and the comments of the Federal Power Commission. Therefore, even this condition was satisfied.

The court further held that, even if the Commission's letter were to be construed as constituting a recommendation to Congress that the water resources of the Roanoke River Basin should be developed by the United States, the Commission was not precluded from approving VEPCO's application, because that recommendation was made "in 1944 and Congress has taken no action in the meantime, except with respect to the Buggs Island and Philpott projects" (V, 41).

Insofar as the court stated that Congress had taken no action, except with respect to Buggs Island and Philpott, it erred, because Congress did take action when it approved the comprehensive plan for development of the Roanoke

River Basin for flood control and other purposes.[28]

The court's mention of the fact that the Commission's recommendation was submitted in 1944, was to lay a foundation for an argument that the two-year period of limitations prescribed in the penultimate proviso of Section 4 (e) of the Federal Power Act may be read into Section 7 (b) of the Act.

In Section 4 (e), the Commission is empowered to grant licenses for the utilization of Government dams. It is provided, however, that "in case the Commission shall find that any Government dam may be advantageously used by the

[28] When the Chief of Engineers submitted his report (H. Doc. 650) to the House of Representatives; the House had already passed H. R. 4485, 78th Congress, Second Session. Later, the Senate Committee on Commerce held hearings on this bill. Col. Goethals of the Corps of Engineers appeared before the Senate Committee and urged the adoption of the comprehensive plan and the authorization of appropriations for the construction of Buggs Island and Philpott as the *initial step* in the development, or, as he stated, "at this time." The Senate Committee amended the bill to include this comprehensive plan among the public works to be "adopted and authorized." The bill, as amended, was passed by the Senate and then went to conference. The conferees agreed on this amendment, among others, and then the bill, as amended, was passed by both Houses of Congress and was signed by the President on December 22, 1944. Thus the "Congressional action" was to approve the comprehensive plan and include it among the works of improvement adopted and authorized in Section 10 of the Flood Control Act of 1944. Yet, according to the court below, "Congress has taken no action", except with respect to Buggs Island and Philpott (V, 41) (see also note 20, *supra*).

United States for public purposes in addition to navigation, no license shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, * * *." Because of this provision, the court read into Section 7 (b) a two-year period of limitations.

The penultimate proviso of Section 4 (e) has no application whatever to the present case for the following reasons:

First, the proviso deals with what are known as "navigation dams"; the project under consideration is not a navigation dam, but one to be constructed for flood control and allied purposes as part of a comprehensive plan for the development of the Roanoke River Basin.

Second, the Commission's licensing power is limited by the requirement that, if the Commission finds that such navigation dams, may be advantageously used by the United States for purposes other than navigation, it shall report the facts to Congress. The obvious purpose of this provision is that Congress, if apprised of these facts, may determine that the development for purposes other than navigation should be undertaken by the United States. Here, the Commission, through its letter to the Chief of Engineers, did make its views known to Congress, and Congress, acting upon the recommendations of the Commission, approved the comprehensive plan, including Roanoke Rapids, for flood control and other purposes. Section 4 (e) does not

mean that if Congress approves the utilization of a navigation dam by the Government for purposes other than navigation, the Commission may nevertheless disregard such Congressional action and issue a license for non-Federal development.

Third, the penultimate proviso in Section 4 (e) of the Federal Power Act must also be reconciled with Section 5 of the Flood Control Act of 1944. This section provides that "power and energy generated at reservoir projects under control of the Department of the Army * * * shall be delivered to the Secretary of the Interior". This precludes non-Federal development of power at any reservoir project under the control of the Department of the Army.

IV

CONSEQUENCES OF THE DECISION OF THE COURT BELOW

The importance of this case lies in the consequences of the decision below, not only in relation to the Roanoke River Basin, but also to every other river basin the Federal development of which has been approved by Congress.

1. The decision of the court jeopardizes all river basin developments that have been approved by Congress by making their realization contingent upon the nonissuance of licenses by the Commission.

In every comprehensive river basin plan, some project units are more desirable than others. If Congressionally approved comprehensive plans

do not preclude the licensing of their constituent project units, then it is to be expected that private power companies will seek licenses for the development of those project sites which are economically most advantageous, leaving for Federal development only the infeasible or the least feasible projects. If licenses are granted for the most advantageous projects, the Congressionally approved comprehensive plans will be disrupted.

2. The decision vitiates the principle that the river basin must be the basic unit of water resources development if the maximum benefits are to be realized, and puts beyond reach any coordination or integration of river basins on a regional basis.

3. The decision of the court operates against the congressionally established principle that public power should be so disposed of as to encourage the most widespread use thereof at the lowest possible rates to consumers.

To obtain this result, it is important that the cost of generation and transmission be the lowest possible. In addition, it is important that the amount of public power distributed should be large enough to constitute an effective competitive element in the distribution of power in the area. Experience has shown that, with such an effective competitive element, power rates are lowered and consumption of power is increased, with resulting benefit to both consumers and private power companies.

4. The decision of the court operates to surrender the benefits of the Government's investment in upstream developments to private power companies, rather than to distribute such benefits among the people in the area.

Wherefore, it is respectfully requested that the petition should be granted.

Respectfully submitted.

GREGORY HANKIN,
Counsel for Petitioner, the United States of America, on the relation of Oscar L. Chapman, Secretary of the Interior.

MARCH 1952.

The Secretary of the Interior and the Federal Power Commission are adverse parties in this proceeding, and I am authorizing each to be represented in the Supreme Court by agency counsel.

PHILIP B. PERLMAN,
Solicitor General.

APPENDIX

STATUTES INVOLVED

Act of March 1, 1917, section 3, 39 Stat. 950, 33 U. S. C. 1946 ed., section 701:

> Section 701. Flood control generally:
> *Laws applicable to works of improvement relating to flood control.*—All the provisions of existing law relating to examinations and surveys and to works of improvement of rivers and harbors shall apply, so far as applicable to examinations and surveys and to works of improvement relating to flood control. And all expenditures of funds appropriated for works and projects relating to flood control shall be made in accordance with and subject to the law governing the disbursement and expenditure of funds appropriated for the improvement of rivers and harbors.
> *Examinations and surveys; details from Government departments; reports.*—All examinations and surveys of projects relating to flood control shall include a comprehensive study of the watershed or watersheds, and the report thereon in addition to any other matter upon which a report is required shall give such data as it may be practicable to secure in regard to (a) the extent and character of the area to be affected by the proposed improvement; (b) the probable effect upon any navigable water or waterway; (c) the possible economical development and utilization of water power; and (d) such other uses as may be properly related to or coordinated

with the project. And the heads of the several departments of the Government may, in their discretion, and shall upon the request of the Secretary of War, detail representatives from their respective departments to assist the Engineers of the Army in the study and examination of such watersheds, to the end that duplication of work may be avoided and the various services of the Government economically coordinated therein: *Provided,* That all reports on preliminary examinations hereafter authorized, together with the report of the Board of Engineers for Rivers and Harbors thereon and the separate report of the representative of any other department, shall be submitted to the Secretary of War by the Chief of Engineers, with his recommendations, and shall be transmitted by the Secretary of War to the House of Representatives, and are hereby ordered to be printed when so made.

Reports by Board of Engineers for Rivers and Harbors.—In the consideration of all works and projects relating to flood control which may be submitted to the Board of Engineers for Rivers and Harbors for consideration and recommendation, said board shall, in addition to any other matters upon which it may be required to report, state its opinion as to (a) what Federal interest, if any, is involved in the proposed improvement; (b) what share of the expense, if any, should be borne by the United States; and (c) the advisability of adopting the project.

Aiding Committee on Flood Control.—All examinations and reports which may now be made by the Board of Engineers for Rivers and Harbors upon request of the Committee on Rivers and Harbors re-

lating to works or projects of navigation shall in like manner be made upon request of the Committee on Flood Control on all works and projects relating to flood control (Mar. 1, 1917, ch. 144, sec. 3, 39 Stat. 950).

Section 701a–1. Same; definition of "flood control"; jurisdiction of Federal investigations.

The words "flood control" as used in section 701a of this title, shall be construed to include channel and major drainage improvements, and Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of and shall be prosecuted by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers, and Federal investigations of watersheds and measures for run-off and water-flow retardation and soil-erosion prevention on watersheds shall be under the jurisdiction of and shall be prosecuted by the Department of Agriculture under the direction of the Secretary of Agriculture, except as otherwise provided by Act of Congress (Dec. 22, 1944, ch. 665, sec. 2, 58 Stat. 889).

Section 701b. Same; supervision of Secretary of War and Secretary of Agriculture; reclamation projects unaffected.

Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of and shall be prosecuted by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers, and Federal investigations of watersheds and measures for run-off and waterflow retardation and soil-erosion prevention on watersheds shall

be under the jurisdiction of and shall be prosecuted by the Department of Agriculture under the direction of the Secretary of Agriculture, except as otherwise provided by Act of Congress; and in their reports upon examinations and surveys, the Secretary of War and the Secretary of Agriculture shall be guided as to flood-control measures by the principles set forth in section 701a of this title in the determination of the Federal interests involved: *Provided*, That the foregoing grants of authority shall not interfere with investigations and river improvements incident to reclamation projects that may now be in progress or may be hereafter undertaken by the Bureau of Reclamation of the Interior Department pursuant to any general or specific authorization of law (June 22, 1936, ch. 688, sec. 2, 49 Stat. 1570; June 28, 1938, ch. 795, sec. 1, 52 Stat. 1215; Aug. 18, 1941, ch. 377, sec. 1, 55 Stat. 638).

Flood Control Act of 1936, 49 Stat. 1570:

Sec. 1. It is hereby recognized that destructive floods upon the rivers of the United States, upsetting orderly processes and causing loss of life and property, including the erosion of lands, and impairing and obstructing navigation, highways, railroads, and other channels of commerce between the States, constitute a menace to national welfare; that it is the sense of Congress that flood control on navigable waters or their tributaries is a proper activity of the Federal Government in cooperation with States, their political subdivisions, and localities thereof; that investigations and improvements of rivers and other waterways, including watersheds thereof, for flood-control purposes are in

the interest of the general welfare; that the Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watersheds thereof, for flood-control purposes if the benefits to whomsoever they may accrue are in excess of the estimated costs, and if the lives and social security of people are otherwise adversely affected.

Sec. 2. That, hereafter, Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of and shall be prosecuted by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers, * * * except as otherwise provided by Act of Congress; and that in their reports upon examinations and surveys, the Secretary of War and the Secretary of Agriculture shall be guided as to flood-control measures by the principles set forth in section 1 in the determination of the Federal interests involved: *Provided,* That the foregoing grants of authority shall not interfere with investigations and river improvements incident to reclamation projects that may now be in progress or may be hereafter undertaken by the Bureau of Reclamation of the Interior Department pursuant to any general or specific authorization of law.

* * * * *

Sec. 6. The Secretary of War is hereby authorized and directed to cause preliminary examinations and surveys for flood control at the following-named localities, and the Secretary of Agriculture is authorized and directed to cause preliminary examinations and surveys for run-off and

waterflow retardation and soil erosion prevention on the watersheds of such localities; the cost thereof to be paid from appropriations heretofore or hereafter made for such purposes: *Provided*, That no preliminary examination, survey, project, or estimate for new works other than those designated in this or some prior Act or joint resolution shall be made: *Provided further*, That after the regular or formal reports made as hereby authorized on any examination, survey, project, or work under way or proposed are submitted to Congress, no supplemental or additional report or estimate shall be made unless authorized by law or by resolution of the Committee on Flood Control of the House of Representatives or the Committee on Commerce of the Senate: *And provided further*, That the Government shall not be deemed to have entered upon any project for the improvement of any waterway mentioned in this Act until the project for the proposed work shall have been adopted by law:

* * * * *

Sec. 7. The Secretary of War is hereby authorized and directed to continue surveys, studies, and reports at the following-named localities, where, according to the surveys and estimates already made, opportunities appear to exist for useful flood-control operations with economical development of hydroelectric power whenever sufficient markets to absorb such power become available; the cost of these surveys to be paid from appropriations heretofore or hereafter made under the authorization in this Act or subsequent similar Acts:

* * * * *

Reservoirs in Roanoke and Tar Rivers, North Carolina.

* * * * *

Flood Control Act of 1938, 52 Stat. 1215:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, hereafter, Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of and shall be prosecuted by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers, * * * except as otherwise provided by Act of Congress.

* * * * *

Sec. 4. That the following works of improvement for the benefit of navigation and the control of destructive floodwaters and other purposes are hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated: *Provided,* That penstocks or other similar facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam herein authorized when approved by the Secretary of War upon the recommendation of the Chief of Engineers and of the Federal Power Commission.

* * * * *

Sec. 6. The Secretary of War is hereby authorized and directed to cause preliminary examinations and surveys for flood control including floods aggravated by or

due to tidal effect at the following-named localities, and the Secretary of Agriculture is authorized and directed to cause preliminary examinations and surveys for run off and water-flow retardation and soil-erosion prevention on the watersheds of such localities; the cost thereof to be paid from appropriations heretofore or hereafter made for such purposes: *Provided,* That no preliminary examination, survey, project, or estimate for new works other than those designated in this or some prior Act or joint resolution shall be made: *Provided further,* That after the regular or formal reports made as hereby authorized on any examination, survey, project, or work under way or proposed are submitted to Congress, no supplemental or additional report or estimate shall be made unless authorized by law or by resolution of the Committee on Flood Control of the House of Representatives or the Committee on Commerce of the Senate: *And provided further,* That the Government shall not be deemed to have entered upon any project for the improvement of any waterway mentioned in this Act until the project for the proposed work shall have been adopted by law:

* * * * *

Smith River and its tributaries, Virginia and North Carolina.

* * * * *

Flood Control Act of 1944, 58 Stat. 887:

* * * * *

Sec. 2. That the words "flood control" as used in section 1 of the Act of June 22, 1936, shall be construed to include channel and major drainage improvements, and

that hereafter Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of and shall be prosecuted by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers, * * * except as otherwise provided by Act of Congress.

* * * * *

Sec. 5. Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related

facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives and privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts.

* * * * *

SEC. 10. That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized in the interest of the national security and with a view toward providing an adequate reservoir of useful and worthy public works for the post-war construction program, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein: *Provided*, That the necessary plans, specifications, and preliminary work may be prosecuted on any project authorized in this Act to be constructed by the War Department during the war, with funds from appropriations heretofore or hereafter made for flood control, so as to be ready for rapid inauguration of a post-war program of construction: *Provided further*, That when the existing critical situation with respect to materials, equipment, and manpower no longer exists, and in any event not later than immediately following the cessation of hostilities in the present

war; the projects herein shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements: *And provided further,* That penstocks and other similar facilities adapted to possible future use in the development of hydro-electric power shall be installed in any dam authorized in this Act for construction by the War Department when approved by the Secretary of War on the recommendation of the Chief of Engineers and the Federal Power Commission.

* * * * *

ROANOKE RIVER BASIN

The general plan for the comprehensive development of the Roanoke River Basin for flood control and other purposes recommended by the Chief of Engineers in House Document Numbered 650, Seventy-eighth Congress, second session, is approved and the construction of the Buggs Island Reservoir on the Roanoke River in Virginia and North Carolina, and the Philpott Reservoir on the Smith River in Virginia, are hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in that report at an estimated cost of $36,140,000.

* * * * *

Federal Power Act, 41 Stat. 1063, 49 Stat. 838:

* * * * *

Sec. 4. The Commission is hereby authorized and empowered—

* * * * *

(c) To cooperate with the executive departments and other agencies of State or

National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the Commission to furnish such records, papers, and information in their possession as may be requested by the Commission, and temporarily to detail to the Commission such officers or experts as may be necessary in such investigations.

* * * * *

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such

reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further,* That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

* * * * *

Sec. 7 * * *

(b) Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

* * * * * *

Sec. 10. All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * * * * *

(f) That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of

the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the Commission. The licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission.

Whenever such reservoir or other improvement is constructed by the United States the Commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 17 hereof.

Whenever any power project not under license is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the Commission, after notice to the owner or owners of such unlicensed project, shall determine and fix a reasonable and equitable annual charge to be paid to the licensee or permittee on account of such benefits, or to the United States if it be the owner of such headwater improvement.

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Sec. 313. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehear-

ing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or

in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

U. S. GOVERNMENT PRINTING OFFICE: 1952